Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, PH.D., Secretary, DOC; DAVID DiGUGLIELMO, Superintendent, SCI-Graterford; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,
Petitioners

v.

ARNOLD HOLLOWAY,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS W. DOLGENOS
Chief, Federal Litigation Unit
RONALD EISENBERG
Deputy District Attorney
(*Counsel of Record*)
ARNOLD H. GORDON
First Asst. District Attorney
LYNNE ABRAHAM
District Attorney

1421 Arch Street
Philadelphia, PA 19102
(215) 686-5700

THIS IS A CAPITAL CASE

QUESTIONS PRESENTED

1. Does the federal Constitution prohibit state courts from requiring that Batson claimants make a minimally adequate record showing the accused lawyer's pattern of peremptory strikes?

(Answered in the affirmative by the United States Court of Appeals for the Third Circuit.)

2. Where a lawyer is accused of discrimination in his use of peremptory challenges, does the federal Constitution render irrelevant certain circumstantial evidence of his intent, including that he accepted or rejected other jurors of the same race?

(Answered in the affirmative by the United States Court of Appeals for the Third Circuit.)

3. When a counseled state criminal defendant files a "supplemental" appellate brief that is improper and late under state rules, and which the state courts never mention or review, are the claims therein "exhausted" for the purposes of federal habeas review?

(Answered in the affirmative by the United States Court of Appeals for the Third Circuit.)

LIST OF PARTIES

Petitioners:

Jeffrey A. Beard, Ph.D, Secretary of the Pennsylvania Department of Corrections; Mr. Beard succeeded Martin Horn, an original respondent in the Third Circuit Court of Appeals, in that capacity.

David DiGuglielmo, Superintendent of the State Correctional Institution at Graterford; Mr. Diguglielmo succeeded Donald Vaughn, an original respondent in the Third Circuit Court of Appeals, in that capacity.

The District Attorney of the County of Philadelphia.

The Attorney General of the State of Pennsylvania.

Respondent:

Arnold Holloway.

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ORDERS AND OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals for the Third Circuit, granting the petition for writ of habeas corpus and reversing the order of the district court, is dated January 22, 2004, and is reported at 355 F.3d 707. It is reprinted in the Appendix at App. 3-45. The March 3, 2004, order of the Third Circuit denying the state's Motion for Rehearing *En Banc* is reprinted at App. 1-2. The August 27, 2001, order of the district court denying the petition for writ of habeas corpus with respect to Holloway's trial, but granting it with respect to sentencing, is reported at 161 F. Supp.2d 452, and is reprinted at App. 46-303.

STATEMENT OF JURISDICTION

This is a federal habeas corpus proceeding brought by a state capital defendant. Petitioners seek review of the order of the Third Circuit dated January 22, 2004, reversing the order of the district court, and granting the writ and a new trial. The court denied *en banc* rehearing on March 3, 2004. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, which provides, in relevant part:

> **Section 1.** ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d), which provides, in relevant part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; ...

STATEMENT OF THE CASE

On the night of May 16, 1980, respondent Arnold Holloway and one other man tied up 17-year-old Richard Caldwell in the back of a van, tied a belt around his neck and pulled it tight, and then killed him with a point-blank shotgun blast. The killers left Caldwell's body in a gutter. This was a drug murder – Caldwell had recently been selling drugs for a drug gang headed by Leroy Johnson, and he owed the gang money. Johnson ordered Holloway, a member of the organization, to kill Caldwell. Several years later, after a long investigation, Holloway confessed to police.

A Philadelphia jury convicted Holloway of first degree murder in May of 1986. Following a penalty hearing, the same jury sentenced Holloway to death. He received an additional aggregate sentence of twelve and one-half to twenty-five years in prison on his related convictions.

Holloway has spent almost twenty years attacking his conviction and sentence. First, he filed post-trial motions, which the trial court denied after a hearing in 1987. Holloway took a direct appeal, and the Pennsylvania Supreme Court affirmed the conviction and sentence. Commonwealth v. Holloway, 572 A.2d 687 (Pa. 1990). On May 3, 1991, Holloway filed a *pro se* petition for collateral relief under the Pennsylvania Post-Conviction Relief Act, 42 Pa. C.S. § 9541 *et seq.* ("PCRA"). Counsel was appointed, and the petition was supplemented and amended several times. The PCRA court held an evidentiary hearing, and subsequently denied relief. The Pennsylvania Supreme Court once again affirmed. Commonwealth v. Holloway, 739 A.2d 1039 (Pa. 1999).

Next, Holloway sought relief in federal court, filing a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 on April 3, 2000. This petition contained eighteen claims for relief; together with the supporting memorandum of law and reply brief, Holloway presented the district court with approximately 300 pages of briefing, not including a separate discovery motion. On August 27, 2001, the district court issued a long and thorough opinion denying Holloway a new trial but granting the writ with respect to the sentencing phase. The court held that trial counsel had been ineffective for failing to investigate and present sufficient evidence of Holloway's background and mental health as potential mitigation. App. 300.

Both parties filed notices of appeal. The Third Circuit granted Holloway a Certificate of Appealability on six separate issues, including Batson. After voluminous briefing and oral argument, the panel reversed the district court and granted a new trial on Batson grounds. (The Court of Appeals did not reach any of the other claims.) The

Commonwealth sought rehearing, which was denied on March 3, 2004.

I. Procedural history of the *Batson* claim.

Trial counsel did not object to the prosecutor's use of peremptory strikes until the second day of *voir dire* – after nine jurors were already chosen, and the Commonwealth had used eight peremptory challenges (out of a possible 20). App. 104. At the point when Holloway lodged his objection, the trial record reflects only the race of the nine jurors already chosen (seven whites and two blacks), and it does not establish the racial composition of the other venirepersons. The court denied Holloway's subsequent motion for a mistrial. Id. As the *voir dire* continued, defense counsel noted for the record the race of some (but not all) of the venirepersons, but did not renew his objection. App. 105-107.

In post-verdict motions, defense counsel merely alleged, in one sentence, "[t]hat the Commonwealth systematically excluded all Black jurors by using his peremptory challenges." See Motion For New Trial And/Or Arrest of Judgment, at 3, ¶12. A. 405.[1] The trial court summarily dismissed this undeveloped, unsupported, and factually incorrect claim. See Post-Trial Opinion at 5, S.A.14.[2] ("Defendant's points 1-3, 12 and 14 are general unspecific allegations of error which will not be addressed in

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[1] Citations to "A." refer to the multi-volume appendix filed with the Third Circuit.

[2] Citations to "S.A." refer to the Commonwealth's one-volume supplemental appendix, filed with the Third Circuit.

this Opinion. This Court will not comb the record in an attempt to uncover facts and/or legal rationale in support of these claims.") On direct appeal, Holloway's counsel did not raise the Batson issue, nor did he raise a claim of trial counsel's ineffectiveness in failing to adequately preserve (or make a record in support of) the Batson issue. App. 107.

On state collateral review, represented by yet another attorney, Holloway attempted to cure his waiver by pursuing a claim of trial and appellate counsel ineffectiveness in failing to adequately preserve and argue the Batson issue. See Amended Petition Under Post Conviction Relief Act, at 3. S.A.110. This claim was entirely based on the prosecutor's pattern of strikes, and Holloway made only two factual assertions: "The Trial Court erred in allowing the Prosecutor to peremptorily strike ten (10) perspective [sic] jurors who were black," S.A. 110, and "[o]nly two out of ten jurors chosen for trial were black, the other ten were white," id. Both of these statements were incorrect.[3] No other information was given – for example, how he had arrived at those numbers, or the race of the jurors *accepted* by the prosecution, or the racial composition of the venire. At the PCRA evidentiary hearing on February 10, 1997, counsel rested on the existing record without attempting to supplement the Batson record in any way. App. 127. In fact, the Commonwealth is unaware of *any attempt* by PCRA counsel to supplement the record on the Batson issue *in any way*, either at the hearing or through other means. The PCRA court, not surprisingly, rejected the factually and legally undeveloped ineffectiveness/Batson claim. App. 108-109

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[3] Holloway also listed the names of the jurors who were struck by the prosecution.

n.30. As explained further below, the state supreme court rejected the Batson claim on PCRA appeal because there was an inadequate record. 739 A.2d at 1045.

The Commonwealth objected to Holloway's belated attempts to develop a record in this federal habeas action. Nevertheless, the district court accepted more evidence. First, the parties entered a stipulation as to the race of the jurors in this case (largely taken from the prosecutor's contemporaneous notes), as well as the race of those panel members dismissed for cause, hardship, or by agreement, and those struck peremptorily by both sides. A.663-70. The stipulation establishes (among other things) that three African-Americans served on Holloway's jury. Second, the district court held an evidentiary hearing to take the testimony of Holloway's direct appeal counsel, Robert Redmond, Esq. Mr. Redmond testified, and the district court found, that he did not raise the Batson claim on appeal because the record had not been properly developed, and he believed the claim to be weak. App. 142-43.

In sum, the Batson claim was rejected during *voir dire*, at post-verdict motions, at the PCRA stage, on PCRA appeal, and by the district court. Holloway failed to develop a meaningful record in state court and failed to demonstrate to the federal district court, even after a hearing, that any jury discrimination had occurred or that direct appeal counsel had been ineffective for abandoning the claim. The Third Circuit, however, granted a new trial on the Batson claim, holding that the claim had been exhausted on direct appeal, the state court was wrong to require a more developed record on collateral review, and evidence about the race of the jurors whom the prosecutor *accepted* – as well as other circumstantial evidence – was irrelevant.

REASONS FOR GRANTING THE WRIT

I. States may require that *Batson* claimants make an adequate record, including the race of the jurors struck and accepted by the accused lawyer.

This case is about the kind of evidence that is relevant to a claim of discriminatory peremptory challenges under Batson v. Kentucky, 476 U.S. 79 (1986), the kind of record a Batson claimant must present on appeal, and the power of state courts to set and enforce their own appellate rules. The Third Circuit has taken an extremely narrow view of Batson relevance, which violates both precedent and common sense, and has restricted the ability of appellate courts to require that Batson claimants make an adequate record. In the process, the decision below threatens to disrupt the administration of Batson in the Pennsylvania state and federal courts, not to mention the rules of exhaustion.

The Third Circuit's first two errors arise from its cramped view of what constitutes proper evidence of jury discrimination. The question of discriminatory intent can be difficult to resolve, because direct evidence of intent is rare. In Batson itself, this Court recognized the difficulty, and prescribed a "sensitive inquiry" that takes into account "all possible explanatory factors in the particular case." 476 U.S. at 93, 95 (quotation omitted). The Court also explicitly declined to implement a set of inflexible rules, leaving the administration of Batson to states and jurisdictions across the country. Id. at 99 & n.24. The Court has further recognized that this built-in flexibility includes the power to fashion rules regarding Batson *evidence*. Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 631 (1991) (Batson left to trial courts "to develop evidentiary rules" for its implementation).

In furtherance of these principles, the Pennsylvania Supreme Court has long insisted that a litigant who loses a Batson claim at trial, and seeks to renew it on appeal, must preserve a record that can support a minimally "sensitive inquiry" into the question of discrimination. The requirement is neither surprising nor onerous. All the Batson claimant must do is identify the race of the jurors struck by the alleged discriminator, and those accepted by him. Holloway, 739 A.2d at 1045, citing Commonwealth v. Bronshtein, 691 A.2d 907 (Pa.), cert. denied, 522 U.S. 936 (1997). See also Commonwealth v. Spence, 627 A.2d 1176, 1182-83 (Pa. 1993).[4] Without such evidence, there is no way of knowing the accused lawyer's pattern of peremptory challenges. It is only common sense that a prosecutor who accepts a number of African American jurors may not be acting out of racial animus if he accepts others.

In its opinion below, the Third Circuit has held that this record-making requirement, invoked often by the Pennsylvania courts, violates Batson. This Court should

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[4] The requirement is generally stated this way: "In order to establish a cognizable Batson claim on appeal, a defendant is required to make a record specifically identifying the race of all the venirepersons stricken by the prosecution, the race of the jurors acceptable to the prosecution who were stricken by the defense and the racial composition of the jury selected." Commonwealth v. Hackett, 735 A.2d 688, 694 (Pa. 1999), cert denied, 528 U.S. 1163 (2000). This amounts to the race of the jurors rejected by the prosecutor, and those accepted by him, because this latter group ends up either on the jury or challenged by the defense.

grant *certiorari* to reaffirm the principle that courts making a Batson decision should take into account "*all* relevant circumstances," 476 U.S. at 96 (emphasis added), rather than a narrow slice of that evidence; in addition, state and federal appellate courts may require a minimally adequate record to allow a sensitive Batson inquiry.

The Third Circuit's extremely narrow view of Batson relevance allowed it to ignore Holloway's failure to make a record in state court. His trial counsel identified the race of only a handful of venirepersons. His post-verdict motions relied on a bald, false allegation that blacks were completely excluded from the jury. Holloway's new counsel abandoned this shaky claim completely on direct appeal. During state collateral review, Holloway made another bare-bones Batson allegation, this time asserting that two of the twelve deliberating jurors were black. This was also *wrong*. Holloway made no attempt to supplement the record, even though he had an evidentiary hearing. On collateral appeal, Holloway abandoned his assertions about the number of African-Americans on the jury (probably because he did not know the correct number). He alleged for the first time, more than a decade after trial, that eleven out of the prosecutor's twelve peremptory strikes were used against African-Americans, A.495, and belatedly asked for an evidentiary hearing even though he had plainly waived any further opportunity to present evidence. The state has plainly been prejudiced by the passage of time: At this point, the prosecutor is no longer available to explain his peremptory challenges, even if he could remember them.[5] This lack of

[5] The parties stipulated before the district court that the trial prosecutor is now disabled and unable to provide meaningful testimony about his jury selection. App. 138.

record, attributable to Holloway's failure to *make* a record, should have precluded any Batson hearing in federal court, let alone relief. 28 U.S.C. §2254(e)(2); Michael Williams v. Taylor, 529 U.S. 420, 436-39 (2000).

The state supreme court was not impressed by Holloway's lack of effort. The Court held on collateral appeal that he could not possibly be entitled to relief because he had not preserved an adequate record. This was not a surprising or draconian result – it is common sense. After all, the thrust of Holloway's claim was that the prosecutor had used a surprisingly high proportion of his challenges to remove African Americans from the jury, and that discrimination was the probable explanation. But Holloway made no representation at all about the jurors whom the prosecutor accepted. The appellate court simply could not assess Holloway's Batson claim without this factual support.

The Pennsylvania Supreme Court's common sense "record making" requirement makes sense as a general rule for adjudicating Batson claims on appeal and collateral review. It is easy to accuse the prosecutor of racism once the trial is over. On the other hand, such claims are almost impossible to disprove without a complete record. In order to maintain an efficient justice system – where final judgments are not perpetually open to attack by newly minted Batson claims – it is essential that the record be minimally complete. That way, when a litigant makes a Batson claim on appeal based on his adversary's pattern of strikes, the appellate court knows what the pattern actually *was*.

The Pennsylvania record-making requirement is not contrary to Batson. Indeed, under Batson, courts are not merely permitted, but *required*, to consider all available relevant circumstantial evidence that may render the

accusation more or less believable. 476 U.S. at 93 ("a court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available") (quotation omitted); id. at 96-97 (judges "should consider all relevant circumstances" that "might give rise to an inference of purposeful discrimination"). This evidence, also described as the "totality of the relevant facts," includes "proof of disproportionate impact" – that is, the pattern of jurors struck, and those not struck. Id. at 93. In case after case, this Court has examined such evidence in evaluating claims of jury discrimination under Batson. See, e.g., J.E.B. v. Alabama, 511 U.S. 127, 129 (1994) (intentional discrimination on basis of gender in selection of jury violates equal protection; Court notes gender of all jurors struck by both sides); Powers v. Ohio, 499 U.S. 400, 402, 415 (1991) (extending Batson to criminal defendants of different race then excluded juror; Court notes lack of record with respect to jurors accepted by prosecution, and/or challenged by defense; remanded for further proceedings); Ford v. Georgia, 498 U.S. 411, 414 (1991) (in reviewing Swain/Batson claim, Court notes number of black jurors seated on the jury and challenged by both sides, as well as number of peremptories available to each litigant); Griffith v. Kentucky, 479 U.S. 314, 317-19 (1987) (holding Batson retroactive to all cases not yet final at time of decision; notes race of all peremptories used by both sides, and race of jurors who heard case); Batson, 476 U.S. at 83 (noting racial composition of jury).

Petitioners like Holloway who make what is essentially a kind of "disproportionate impact" claim – raising the inference of discrimination from the results of an allegedly discriminatory process – should naturally bear the burden of providing a record from which that impact can be reliably assessed. After all, it is the "general rule that one seeking relief bears the burden of demonstrating that he is entitled to

it," Clark v. Community for Creative Non-violence, 468 U.S. 288, 293 n.5 (1984). Batson claimants should not be allowed to cherry-pick the evidence they want to preserve, submitting only the evidence they want the appellate court to hear.

The Third Circuit labors to portray the record-making requirement as mechanical and arbitrary, a rigid checklist that denies relief to worthy litigants for no good reason. But that is not what happened here – Holloway lost his state Batson appeal because his allegations were unsupported and the record was obviously inadequate, not because of a hypertechnical omission in his briefs. What is more, the Court of Appeals was unable to identify any Pennsylvania case in which this record-making requirement was applied rigidly or unfairly to a litigant who would otherwise have been entitled to Batson relief. There are no such cases; on the contrary, the defendants who have been denied relief on these grounds have all simply failed to make an adequate record. See, e.g., Commonwealth v. Rollins, 738 A.2d 435, 443 & n.10 (Pa. 1999) (record established race of only one juror alleged to be victim of discrimination); Commonwealth v. Porter, 728 A.2d 890, 900 (Pa. 1999) (defense alleged that prosecution used "at least" eight out of sixteen strikes to remove blacks, but record did not confirm even these numbers); Commonwealth v. Baez, 720 A.2d 711, 736 (Pa. 1998) (record established race of only one juror alleged to have been victim of discrimination); Spence, 627 A.2d at 1182 (record did not reflect race of six jurors out of ten that Spence alleged were struck because of their race). Yet these convictions, and many others, are potentially threatened by the Third Circuit's ruling.

As part of its attempt to characterize the state supreme court's rejection of Holloway's Batson claim as rigid and technical, the Third Circuit classifies the ruling as procedural

rather than substantive. But when a claim is rejected because a litigant fails to set forth facts that would justify relief, that is a substantive ruling. To the extent that the state court's ruling is in the gray area between substance (rejecting the facts as inadequate) and procedure (the technical prerequisites to review are not met), the presumption is that the state court has rejected the federal claim *on the merits*. See Harris v. Reed, 489 U.S. 255 (1989). The only question here is whether the state court's rejection of the Batson claim was contrary to, or an unreasonable application of, this Court's Batson decisions. 28 U.S.C. § 2254(d)(1); Lockyer v. Andrade, 123 S. Ct. 1166, 1172 (2003) (under amended habeas statute, reasonableness of state court decision is "only question that matters"). See, e.g., Overton v. Newton, 295 F.3d 270, 279-80 (2d Cir. 2002) (where state court rejected Batson claim because of an inadequate record, issue was whether that rejection was a reasonable application of Batson). As explained above, the Pennsylvania Supreme Court's decision was consistent with Batson.[6]

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[6] Even if the state court's ruling was procedural, rather than substantive, the Third Circuit was still wrong to grant relief. In that case, the question would be whether the application of this procedural rule was adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 729 (1991). A rule is inadequate if it creates an unfair or unpredictable barrier to the presentation of a federal claim. See, e.g., James v. Kentucky, 466 U.S. 341, 347-50 (1984) (timely assertion of federal claim should not be blocked by state courts simply because defense counsel referred to court's charge as "admonition" rather than "instruction").

There was nothing freakish, surprising, or needlessly technical about the state court's holding. It is a well-settled

(continued ...)

The record-making requirement is not unique to Pennsylvania. Many other courts have recognized that it is the Batson claimant's burden to make a record, and that the race of the jurors accepted and rejected by the prosecutor should be part of a *complete* record. See, e.g., Overton, 295 F.3d at 279-80 (state court's denial of Batson claim reasonable where defendant had failed to present evidence of the prosecutor's full pattern of strikes); United States v. Sangineto-Miranda, 859 F.2d 1501, 1520 (6th Cir. 1988) (defendant has burden of preserving record of facts relevant to Batson claim, including number of blacks seated on jury, and of jurors struck by both sides); Mitchell v. Rees, 114 F.3d 571, 578 (8th Cir. 1997) (defendant's failure to preserve "all relevant circumstances" pertaining to Batson claim – including prosecution's other strikes – properly defeated claim in state court), cert. denied, 522 U.S. 1120 (1998). Indeed, the Third Circuit has itself implemented a similar

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principle that counsel must make an adequate record to support claims of trial error. It is not much of a leap, reading Batson, to conclude that a minimal record of the peremptories exercised and the jurors seated would be necessary to support a valid claim. Batson himself made this record, as did many other criminal defendants at about the same time. See, e.g., Miller-El v. Cockrell, 537 U.S. 322, 331 (2003); Griffith v. Kentucky, 479 U.S. 314, 316-17 (1987). In any event, it was clear by the time of Holloway's collateral review hearing in 1997 that a complete record of the prosecutor's strikes was a prerequisite to Batson relief. Yet, Holloway made no effort to adduce more evidence during collateral review. The problem here is not adequacy of the state court's rule, but lack of diligence by the defense in supporting its claim.

requirement, which it has applied in other cases. Sistrunk v. Vaughn, 96 F.3d 666, 671 n.5 (3d Cir. 1996) ("Sistrunk was obligated not only to raise his jury selection claim in the PCRA proceeding but also to develop a record there supporting his claim"); Walker v. Vaughn, 53 F.3d 609, 612 (3d Cir. 1995) (Walker did not provide evidence "regarding the number of people on the jury, the number of black jurors, and the number of black individuals who were stricken from the jury", so minimum Batson showing not met); Deputy v. Taylor, 19 F.3d 1485, 1492 (3d Cir.) (without evidence of the pattern of strikes in a particular venire, minimum *prima facie* showing not met), cert denied, 512 U.S. 1230 (1994). Pennsylvania should be able to require the same thing.

The Third Circuit offered several specific reasons for its rejection of the record-making requirement, but none of these are persuasive. First, the court suggested that Batson claimants should not be burdened with this requirement at the first step of Batson's three-part procedure, that is, the *prima facie* stage. The panel suggested that this sort of evidence might be relevant only to Batson's third step – the ultimate decision of whether discrimination took place. App. 42.

But this is a false distinction. This evidence is just as relevant at step one as it is at step three. When a defendant attempts to make out a *prima facie* case of discrimination, the prosecutor can respond by arguing that the evidence does not support an inference of discrimination. Step one does not require *silence* by the accused lawyer. As a practical matter, this distinction also leads to a trap. If this "pattern" evidence is relevant at step *three*, rather than step one, then the dispute is simply postponed. The party accused of discrimination is left at step three without sufficient information to rebut the *prima facie* case, and a new trial is the likely result.

This trap should be avoided. Instead, in light of the rule that an unrebutted *prima facie* case entitles the objector to relief, the requirement of an adequate record should be a threshold matter. Otherwise, the burden on the Batson claimant is improperly lowered – once he makes a *prima facie* showing, the diminished state of the record does not allow an effective reply, and a new trial results. This makes an appellate Batson claim more powerful than a claim actually made when it is supposed to be made, during *voir dire*.

The Third Circuit also suggested that the record-making requirement threatens the principle that discrimination against even one juror violates Batson. But that principle is not in dispute: The question here is the manner in which such a claim may be *proven* once the trial is over, even as to only a single juror. Holloway's claim was premised on the prosecutor's conduct in the *aggregate*. Thus, he tried to make a circumstantial case on collateral review, based on his allegation that the prosecutor used most of his peremptorie against African-Americans. The problem was that the race of a substantial number of venirepersons was not in the record; thus the main assertion upon which this Batson claim was based – the suspiciously large proportion of strikes against blacks – *was unproven*. In fact, he made no attempt on collateral appeal to describe the racial composition of the final jury, or the other jurors accepted by the prosecution. Whether Holloway insisted that one venireperson was the victim of discrimination, or two, or ten, the fact remains that he could not prove his point on an incomplete or incorrect record. Without such a record, any order of relief would be based on speculation.

The Third Circuit's real concern seems to be that the record-making requirement might restrict its ability to grant relief. Nevertheless, as this Court has repeatedly recognized,

states have an interest in the fair and efficient resolution of claims, and they have wide latitude to enforce reasonable restrictions. See, e.g., Coleman, 501 U.S. at 748-51. That is all the Pennsylvania Supreme Court did here. This Court should grant *certiorari* and hear the matter.[7]

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[7] The Third Circuit's concern is perhaps more specific – that this requirement would prevent relief in a death penalty case. After all, the Third Circuit has granted relief in virtually every contested Pennsylvania death penalty case to come before it since the Commonwealth enacted the current death penalty statute about 25 years ago. The only exceptions have come where the court reverses the grant of the writ on one claim, and remands the case to the district court for further consideration of that claim and/or other claims – so relief may eventually issue anyway. Hardcastle v. Horn, 368 F.3d 246, 262 (3d Cir. 2004); Rompilla v. Horn, 355 F.3d 233, 235 (3d Cir. 2004); Whitney v. Horn, 280 F.3d 240, 262 (3d Cir 2002), cert. denied, 537 U.S. 1195 (2003).

Rompilla is of special interest here, because two of the three Third Circuit judges who decided Holloway's case joined a rather extreme anti-death penalty opinion in that case. The Third Circuit in Rompilla narrowly denied relief on a claim of trial counsel's ineffectiveness for failure to investigate and present mitigating mental health evidence – Rompilla's trial counsel had hired two psychiatrists and one psychologist before trial, all of whom found no mental health problems. Rompilla, 355 F.3d at 251. But Rompilla's claim was only narrowly defeated by a vote of 7-5 on a petition for *en banc* rehearing. Rompilla v. Horn, 359 F.3d 310 (3d Cir. 2004) (sur petition for rehearing). Judges McKee and Sloviter – who comprised two-thirds of Holloway's panel – along with one other judge, joined a remarkable opinion in support of

(continued ...)

II. Evidence about the race of jurors who are seated, and other circumstantial evidence relating to the prosecutor's intent, is relevant to a *Batson* claim.

In the opinion below, the Third Circuit declared that certain kinds of evidence are irrelevant to Batson claims. This second error is closely related to the first: Because the Third Circuit has adopted such a narrow, defense-oriented definition of what constitutes "relevant" Batson evidence, it was a logical step to conclude that states cannot require that this extra, irrelevant evidence be part of the record. This Court should grant *certiorari* to correct that first step – and reaffirm that narrow limits on Batson evidence are improper.

First, the court held that the race of jurors accepted by the lawyer accused of discrimination, and seated on the jury or struck by the other side, is *irrelevant*. App. 43. This cannot possibly be right. Courts consider this kind of evidence all the time, and rightly so. For example, it is plainly relevant to a Batson claim if the prosecutor accepts no

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rehearing, comparing Rompilla's trial to the bias-dominated farce endured by the "Scottsboro Boys" in 1931. See Powell v. Alabama, 287 U.S. 45 (1932). The Rompilla dissenters also suggested that the standards of Strickland v. Washington, 466 U.S. 668 (1984), should be modified in death penalty cases, and standards for rehearing such cases should be lowered. 359 F.3d at 310 n.1, 311. It came as no surprise that these same judges held that *this* death-sentenced prisoner was not obligated to make a meaningful record in state court in order to prevail on his claim of jury discrimination.

African-Americans despite many opportunities to do so, thus creating an all-white jury. Criminal defendants should not be prevented from making that argument. The flipside is also true – if counsel accepted *many* African-Americans, and ended up with a jury that was predominantly black, that is also relevant. This may not be dispositive of the Batson issue, but it is plainly probative.

To say that the Third Circuit has created a "circuit split" on this issue is an understatement. The Commonwealth is aware of no other court that has precluded such evidence. But the opinion below is more than a curiosity. Apparently, courts in this circuit – state and federal, appellate and trial – are acting unlawfully if they even *consider* the race of jurors accepted by the lawyer accused of discrimination. The argument is no longer whether such evidence is dispositive – the question is whether this evidence can be discussed at all.

The panel did not seem to fully believe its own holding. For example, the court engaged in juror comparison analysis: That is, it found several black venirepersons whom the prosecutor challenged to be essentially identical to several white jurors whom he accepted. This, the panel concluded, was evidence of discrimination. App. 35. But if the race of other jurors accepted by the prosecution were truly irrelevant, then this sort of comparative analysis would be improper, because the fact that a prosecutor accepted a *white* juror (which the Third Circuit felt free to consider) is logically no more relevant than his acceptance of a *black* juror (which the Third Circuit refused to consider). The relevance of this evidence should not depend on whether it benefits the defense – but that is the only distinction that might explain the Third Circuit's inconsistent approach.

In a separate holding, the court below narrowed the evidence that may be used at "step two" of the Batson inquiry – the opportunity for the party defending the peremptory challenge to provide a "race neutral" explanation for it. The Third Circuit held that these reasons cannot be deduced from circumstantial evidence – these reasons can only come from the accused lawyer himself. App. 36 ("apparent or potential reasons do not shed any light on the prosecutor's intent or state of mind when making the peremptory challenge"). This is especially important where, as here, Batson claims are rejected by the trial court and then litigated on appeal or collateral review. The challenged lawyer may be unavailable or unable to remember why he struck a particular juror. In such situations, circumstantial evidence is critical, and the Batson defender is entitled to rely on it – just as the defense has relied on circumstantial evidence (the pattern of strikes) to establish the inference of discrimination in the first place.

The Third Circuit's "no circumstantial evidence" rule leads to another procedural trap. Where the state courts have rejected a Batson claim and found no *prima facie* case of discrimination, the challenged lawyer is not asked to explain himself, and his race-neutral explanation is not voiced. If the federal court later disagrees and finds a *prima facie* showing, but the lawyer has become unavailable, then according to the Third Circuit the Batson accuser will win by default, without offering more than a *prima facie* inference of discrimination.

This case is a good example of that trap. The Third Circuit believed that the prosecutor may have struck juror John Hackley because of his race. The record, however, contains evidence of reasons *other* than race – for example, Mr. Hackley indicated vaguely that he lived in the neighborhood of the crime, and that he might well have known "some of the people" involved in this case. A.1485.

This possibility was reflected in the prosecutor's contemporaneous notes, where he wrote that Mr. Hackley "knows someone." A.684. But the panel held that this evidence could not even be *considered*. App.35-36.[8]

In Batson this Court held that claims of jury discrimination should be assessed with a "sensitive inquiry" into "all available" evidence. This includes the race of jurors

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[8] The court below emphasized that its inquiry into the Hackley strike was especially circumscribed because the prosecutor had actually offered an explanation for this challenge during *voir dire*. But it is unfair to close the door on other evidence based on this brief exchange, which the court took out of context. What happened is this: Following the prosecutor's peremptory challenge to venireperson Hackley, defense counsel stated, "Let the record show a black juror." App. 29, 34. That was all – this was not even an objection. Without prompting, the prosecutor responded that Mr. Hackley was "a black male juror approximately the same age as defendant." Id. Thus, the prosecutor ironically echoed defense counsel's sole focus on the race of this juror, and followed it with an observation that the juror's race was *not* his sole relevant characteristic. The trial court was silent during this entire exchange; no one asked for more, and the subject of Mr. Hackley was not discussed again. Under the circumstances, where no actual objection was lodged and no one even questioned the prosecutor's brief race-neutral retort – the age of the juror – if this reason is *rejected* years later (as the Third Circuit did) it is simply unfair to prohibit consideration of all other possible explanations. The only reasonable way to assess whether this race-neutral explanation was pretextual, is to examine the other available evidence.

accepted by the alleged discriminator, as well as other circumstantial evidence. This Court should grant *certiorari* and reverse the Third Circuit's attempt to exclude this plainly relevant and necessary evidence.

III. Holloway's supplemental, late *pro se* brief in the Pennsylvania Supreme Court did not "exhaust" the claims therein.

The Third Circuit concluded that it could reach the Batson claim and consider it *de novo* because the claim had been exhausted on direct appeal.[9] But Holloway's counsel did not *raise* the claim on direct appeal. Holloway only included a Batson claim in a late, improper supplemental *pro se* brief that was not even mentioned in the state supreme court's direct appeal opinion. By any reasonable definition – and certainly under this Court's precedent – this was not exhaustion. This Court should grant *certiorari* and say so.

For many years, the rule in Pennsylvania has been clear: Defendants do not have a right to hybrid representation. If they are represented by counsel, they

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[9] This conclusion is critical to the Third Circuit's analysis, because if the Batson claim was *not* exhausted on direct appeal, the most Holloway could logically be entitled to is review of his *ineffectiveness* claim. (That is, his claim that direct appeal counsel should have made the Batson argument.) The Third Circuit did not adjudicate the ineffectiveness claim. Holloway cannot prevail on it because, among other things, the district court found as a fact that Holloway's lawyer on direct appeal had perfectly good reasons for not raising Batson. App. 143-48.

cannot expect to act as co-counsel without special permission. Commonwealth v. Ellis, 626 A.2d 1137 (Pa. 1993); Commonwealth v. Colson, 490 A.2d 811, 821 (Pa. 1985); Commonwealth v. Williams, 410 A.2d 880 (Pa. Super. 1979). See also Hall v. Dorsey, 534 F. Supp. 507 (E.D. Pa. 1982) (recognizing Pennsylvania rule that defendants do not have right to act as co-counsel); Jabbar- Al Samad v. Zimmerman, 1987 WL 26583, *4 (E.D. Pa. 1987) (same). Because of this rule, federal courts have always held that claims raised by Pennsylvania criminal defendants are *not exhausted* by inclusion in *pro se* appellate briefs filed by Pennsylvania defendants, where those defendants are also represented by counsel. Sweger v. Chesney, 294 F.3d 506, 511, 522 (3d Cir. 2002), cert denied, 538 U.S. 1002 (2003); see also Hall v. Zimmerman, 1986 WL 660 (E.D. Pa. 1986).

Holloway himself was aware of the no-hybrid-representation rule, because he *asked permission* to file his supplemental *pro se* brief eight months after his lawyer had filed the principal brief. A.408-409. In fact, the proposed brief was improper in two ways – it was *pro se* when Holloway was represented by counsel, and it was offered after briefing was closed, in violation of Pa. R. App. P. §2501(a). This motion for permission was not granted, however (despite the Third Circuit's contrary conclusion, discussed below), and the Pennsylvania Supreme Court did not mention those claims in its opinion. Holloway, 572 A.2d 687.

After Holloway's direct appeal had ended, no one believed that these never-mentioned, late, supplemental *pro se* claims had been properly presented to the Pennsylvania Supreme Court. Holloway filed a PCRA petition, and he raised a Batson claim; he litigated the claim as if it had not been raised on direct appeal. The Pennsylvania Supreme

Court did not think the Batson claim had been raised on direct appeal, either; in fact, in its PCRA opinion the Court noted that the Batson claim could only be raised as an ineffectiveness claim – in other words, *it had not been raised on direct appeal*. Holloway, 739 A.2d at 1044. No one disputed this ruling.

When Holloway filed his 82-page Petition for Writ of Habeas Corpus, he raised his Batson claim again – and he *still* did not say that it had been exhausted on direct appeal. A.126-209. In fact, he did not even mention his supplemental *pro se* direct appeal brief at all, let alone insist that he had filed it as a matter of right. Nor did Holloway include this *pro se* brief in his 200 pages of supporting exhibits. When Holloway filed his 90-page supporting memorandum of law, he *still* did not mention it. After the Commonwealth responded and pointed out that the Batson claim had only been raised during PCRA proceedings (that is, not on direct appeal), A.211-12, 271, Holloway *still* did not mention it in his 126-page reply brief.

The very first time Holloway argued that the Batson claim had been exhausted in his supplemental *pro se* brief was during the evidentiary hearing before the district court. App. 120-21 n.38. Robert Redmond, Holloway's lawyer on direct appeal, brought it up during his testimony; he stated that during oral argument, a member of the Pennsylvania Supreme Court (he did not remember which one) had indicated that the *pro se* brief had been "received". A.642. Even if this were entirely credible, Redmond did not testify that the Court *accepted* the brief, or obligated itself to consider its claims, or whether a Justice simply noted the existence of the *pro se* filing, or even whether the Court simply noted that it would take the pleadings under advisement. Certainly there was nothing in the record to

suggest that the *pro se* filing had been accepted for review. (Oral arguments before the Pennsylvania Supreme Court are not transcribed.)

Nevertheless, the Third Circuit held that Holloway's *pro se* supplemental direct appeal brief was properly before the state supreme court. App. 12-17. The panel held that the Pennsylvania Supreme Court was *obligated* to accept it. The court pieced together this secret rule from two sources: First, the Pennsylvania Supreme Court did not explicitly approve the practice of not accepting *pro se* briefs filed by counseled defendants until 1993. See Commonwealth v. Ellis, 626 A.2d 1137 (Pa. 1993). Second, the Court *has* sometimes considered claims raised in *pro se* briefs. App. 18-19.

Neither of these two rationales is convincing. In Ellis, the Pennsylvania Supreme Court simply applied the longstanding rule that defendants have no right to hybrid representation. 626 A.2d at 1139, citing Commonwealth v. Colson, 490 A.2d 811, 821 (Pa. 1985). The Court in Ellis explicitly approved the Superior Court's reasoning that, as a matter of policy, appellate courts should not review *pro se* briefs filed by represented appellants. 626 A.2d at 1138-39. The Ellis Court believed it was simply applying the general rule, not blazing a new trail; the existence of Ellis does not mean that the law was the opposite before it was decided, or that the general rule against hybrid representation did not apply to appeals. On the contrary, Holloway knew very well that he had no right to file a late supplemental *pro se* brief – that was why he asked for permission to file it.

The panel also cited a number of cases in which the Pennsylvania Supreme Court explicitly accepted *pro se* briefs from represented defendants, in capital cases. The panel reasoned that these were more than exceptions to the general

rule – they made the rule nonexistent. App. 18-20. But no one disputes that the Pennsylvania Supreme Court *could have* reviewed his *pro se* claims. But the Court *did not* grant permission to file the brief. (Furthermore, all but one of these cases was decided *after* Holloway's direct appeal; so even if they created an unspoken policy in favor of hybrid representation, no such policy was in existence when Holloway filed his brief, or when his direct appeal was decided.) The question here is whether acceptance of *pro se* briefs was *automatic*, and it plainly was not.[10]

To overcome these clear problems, the Third Circuit seized upon the testimony of Holloway's direct appeal attorney Robert Redmond that the Supreme Court had "accepted" his *pro se* brief during oral argument. The panel stated that the Commonwealth did not rebut this evidence "or cast any doubt" on it. App. 17. This is wrong, in a number of ways:

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[10] The panel's attempt to cobble together an unspoken rule allowing *pro se* briefs in capital cases, but not in other cases, was especially weak. Certainly no Pennsylvania court has ever made this distinction. Nor do we know whether the Pennsylvania courts actually accept *pro se* briefs more often in death penalty cases than in other cases, which is what the panel seemed to assume. Rather, the Court of Appeals simply picked several death penalty cases, noted that the Pennsylvania Supreme Court explicitly accepted *pro se* briefs in those matters (which it did not here), and made the puzzling logical leap that this demonstrates a *rule* in capital cases that *pro se* briefs are *always* accepted, even where the *pro se* brief is not mentioned at all.

1. This argument is waived. Under the Eastern District's Local Rule of Civil Procedure 9.4(2)(b), a death-sentenced prisoner "*must*," in his petition for habeas relief, "identify at what stage of the proceedings each claim was exhausted in state court ..." This is not optional; it is mandatory. But nowhere in Holloway's lengthy habeas petition, or his even longer supporting memorandum, or in his still longer reply brief (after the Commonwealth had raised the default argument), did Holloway suggest that his Batson claim (or any other claim) was exhausted due to its inclusion in his improper, late *pro se* supplemental brief. In fact, the *pro se* brief was *not even mentioned at all* in the petition, or the memorandum, or the reply.

When Holloway finally raised this exhaustion argument at the evidentiary hearing before Judge Van Antwerpen, the Commonwealth argued that this theory had never been raised before. A.657. Judge Van Antwerpen agreed. App. 120-21 n.38, 141-42 n.56. It is hardly fair to charge the Commonwealth with the failure to respond to this surprise argument and evidence, which plainly violated the applicable rules, which the Commonwealth had no opportunity to investigate or (or even think through) before the hearing, and which the district court dismissed because it had not been timely raised.

2. Holloway litigated the case for years *as if this had never happened.* Holloway, represented by new counsel, vigorously pursued state collateral relief. He raised his Batson claim, but nowhere mentioned that he had "raised it" before. This is important, because the PCRA bars "previously litigated" claims from further review. 42 Pa. C.S. § 9544(a). If he believed that his Batson claim had been raised on direct appeal, he should have explained why it was nevertheless cognizable – presumably, he would have argued that the Court

had improperly failed to "accept" his late *pro se* brief, and the Court could have explained why it had not done so, thus ending the speculation of whether the brief had been properly filed or accepted. (The Commonwealth also could have responded in a meaningful way to these arguments while memories of the direct appeal were relatively fresh.) Once again, however, Holloway led everyone to believe that his Batson claim had *not* been previously litigated. See A.475-76 (in reciting history of direct appeal in PCRA appeal brief, *pro se* supplemental brief is not mentioned; on the other hand, several *pro se* PCRA filings are discussed).

If Holloway believed that his Batson claim had been previously raised and should have been reviewed, he could have made a record by seeking reconsideration or clarification after the direct appeal was over. At the least, he should have mentioned it on collateral review, and his failure to do so was disingenuous and misleading.

3. Even taking Redmond's testimony at face value, Holloway has still not proven exhaustion. At the evidentiary hearing before the district court, Redmond testified that he did not recall the Batson issue coming up at all during oral argument. A.607. The Court merely stated, according to Redmond, that "it would consider all the matters contained in the pleadings set forth," and he assumed the Batson issue was one of them. A.625-26. When pressed, Redmond said that at the conclusion of oral argument, the Court indicated that it would take "all the matters raised under advisement" and that it had "received" the *pro se* brief. A.642. But "receipt" of the late *pro se* brief – assuming this is the precise word used by the Court – is not acceptance, and does not signal that the merits of the claim would be reviewed. Nor does the Court's statement that it would take the pleadings "under advisement" – certainly a common way

to end oral argument – somehow establish that the Batson issue was properly before it.

So even if all of Redmond's testimony is accepted as true, Holloway has *still* not established that the Pennsylvania Supreme Court agreed to hear his Batson claim.[11] The rule against hybrid representation was not overcome, and the Batson claim was not exhausted on direct appeal. The Third

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[11] There is plenty of reason to believe that Redmond's testimony was not true. The best evidence of what actually happened – the state court docket – mentions no "acceptance" of the *pro se* brief. The utter failure of Redmond, Holloway, or any other counsel to take any action when the *pro se* brief was not mentioned in the direct appeal suggests that no one expected it to be mentioned or decided. Finally, Redmond's testimony on this point was not believable, even taken on its own. In the *very same sentence* where he asserted that the Pennsylvania Supreme Court orally accepted the *pro se* brief, he also insisted that the *pro se* brief had been "timely filed." A.626. He also testified that he *relied* on the contents of that brief while writing his own. A.624, 635. These statements are *false*. The *pro se* brief was filed many months *after* Redmond wrote and filed his brief, and long after any conceivable filing deadline had passed. A.635; A.450. Further, on cross-examination, Redmond admitted that in discussing his upcoming federal court testimony with the prosecutor just a few days before the hearing, he (Redmond) did not mention the *pro se* brief, and he even conceded that he had not remembered the *pro se* brief until Holloway's current counsel brought it to his attention. A.631. The newly-minted character of this testimony casts even more doubt on its reliability.

Circuit may have been eager to decide the Batson claim *de novo*, but this finding of exhaustion was plainly improper. This Court should grant *certiorari*.

CONCLUSION

For the reasons set forth above, petitioners respectfully request that this Court grant the petition for writ of *certiorari*.

Respectfully submitted,

THOMAS W. DOLGENOS
Chief, Federal Litigation
RONALD EISENBERG
(Counsel of Record)
Deputy District Attorney
ARNOLD H. GORDON
First Asst. District Attorney
LYNNE ABRAHAM
District Attorney

Philadelphia District
Attorney's Office
1421 Arch Street
Philadelphia, PA
19102
(215) 686-5700